A

FLORAL TRENDS LTD

v.

LI ONN FLORAL ENTERPRISE (M) SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-2398-1998]
19 MAY 2006

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Triable issues - Whether raised*

CIVIL PROCEDURE: *Affidavits - Contents - Exhibit A annexed to affidavit in support - Document contained Chinese handwritings -*
D *Whether clear without national language translation - Rules of the High Court 1980, O. 92 r. 1*

CONTRACT: *Guarantee - Letter of guarantee - Second defendant signed a letter of guarantee - Whether there was consideration for plaintiff granting loan to first defendant - Failure of first defendant to repay loan*
E *- Whether second defendant shall be made liable - Whether there was a contract in existence between parties*

CIVIL PROCEDURE: *Summary judgment - Appeal against - Plaintiff granting friendly loan to defendants - Failure to repay loan - Allegations*
F *of friendly loan illegal moneylending transaction - Whether substantiated - Whether plaintiff operating a moneylending business - Whether plaintiff a moneylender - Whether plaintiff rebutted presumption as set out in s. 3 Moneylenders Act 1951*

G ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Second defendant's denial of signing letter of guarantee - Allegations of forgery - Failure to lodge a police report - Whether construed as bare allegations*

H This was an appeal by the defendants in encl. 14 against the decision of the senior assistant registrar allowing the plaintiff's application to enter summary judgment against the defendant for the sum of HK$451,421.85 or alternatively the sum of RM259,110.97 which constituted the balance from the sum of HK$1,000,000 together with interest and costs. The plaintiff was
I a company having its office in Hong Kong and was involved in floral business there. The plaintiff had agreed to grant a friendly loan to the first defendant on the second defendant's request to

assist the first defendant in its business. By a letter dated 2 September 1995, the second defendant had given his account number to the plaintiff in order to facilitate the sum of RM320,000 to be remitted to him. On 12 September 1995, the plaintiff instructed its bank to remit the loan for the sum of RM320,000 into the second defendant's account. As a consideration for the plaintiff granting the loan to the first defendant, the second defendant had signed a letter of guarantee dated 11 September 1995 whereby the second defendant agreed to guarantee the said loan together with the interest given to the first defendant and the second defendant too shall be made liable in the event the first defendant failed to repay the loan together with interest thereon to the plaintiff. On 3 June 1998, the plaintiff through its solicitors had demanded from the first and second defendants the outstanding sum. The issues that arose were (1) whether exh. A annexed to the affidavit in support in encl. 4 contained Chinese handwritings which were not translated into Bahasa Malaysia as required by O. 92 r. 1 of the Rules of the High Court 1980; (2) whether there was a contract in existence between the parties and (3) whether the loan granted by the plaintiff to the first defendant was illegal pursuant to the Moneylenders Act 1951 (revised 1989).

Held (dismissing defendants' appeal in encl. 14 with costs):

(1) Exhibit 'A' of encl. 4 was clear even without the national language translation because it stated the account number and the name of the account holder into which the plaintiff had remitted the friendly loan in favour of and for the benefit of the first defendant. All the documents showed that the loan was remitted into the second defendant's account for the benefit of the first defendant who would be able to improve and enhance its business. (para 13)

(2) There was consideration for the plaintiff granting the loan to the first defendant when the second defendant signed a letter of guarantee. By that letter of guarantee, the second defendant agreed to guarantee the said loan together with the interest given to the first defendant. Under that letter of guarantee, the second defendant shall be made liable in the event the first defendant failed to repay the loan together with the interest thereon to the plaintiff. Thus, there was a contract in existence between the parties. (para 16)

(3) The plaintiff was running a floral business. The plaintiff was not required to have a licence in order to give a loan with interest to the first defendant because the plaintiff was not operating a moneylending business and that the loan given to the first defendant was in the words of the plaintiff a 'one off transaction.' The defendants merely alleged that the plaintiff was a moneylender unsupported by any concrete evidence. The plaintiff has rebutted the presumption as set out in s. 3 of the Moneylenders Act 1951 by way of an affidavit evidence. The plaintiff had proved that it was not a moneylender. (paras 17, 20 & 21)

(4) The second defendant denied that he had signed the letter of guarantee and the debit note and that the plaintiff had amended both these documents for its own benefit. Having perused these documents, it was inescapable that the second defendant had signed those documents. It is a criminal wrong to forge a document. If indeed the plaintiff had forged those documents, the second defendant should have lodged a police report forthwith and bring the plaintiff to the altar of justice, so to speak. Bereft of a police report, the allegation by the second defendant must be construed as a bare allegation. (para 23)

(5) The defendants have failed to raise a triable issue and all the allegations raised by the defendants were mere afterthoughts concocted to delay the payment of the friendly loan given by the plaintiff to the first defendant. (para 27)

[Enclosure 31 which concerned the defendants' appeal against decision of SAR in dismissing the defendants' application for a stay pending appeal to the judge in chambers in regard to encl. 14 was also dismissed with costs; court ordered file to be closed.]

Case(s) referred to:

Cambridge Nutrition Ltd v. BBC [1990] 3 All ER 523 ***(refd)***

Currie v. Misa [1875] LR 10 Ex 153 ***(refd)***

Development and Commercial Bank Berhad v. Abdullah Ismail & Anor [1989] 1 CLJ 190; [1989] 1 CLJ (Rep) 467 HC ***(refd)***

First Energy (UK) Ltd v. Hungarian International Bank Ltd [1993] BCLC 1409 ***(refd)***

Goddard 7 Legal Studies 263 and de Moor 106 LQR 632 ***(refd)***

Howarth 100 LQR 265 ***(refd)***
Kapital Raya Sdn Bhd lwn. Bloomville Corp Sdn Bhd [1996] 4 CLJ 510 CA ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Malayan Banking Bhd v. Teguh Consolidated Sdn Bhd & Anor & Another Case [1998] 1 CLJ 254 HC ***(dist)***
Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***
Paldraman Palaniappan & Ors v. Lachemi Sanganayar [1992] 4 CLJ 1870; [1992] 3 CLJ (Rep) 188 HC ***(refd)***
Panchanan Maity [1953] 57 CWN 891 ***(refd)***
Perwira Habib Bank (M) Bhd v. Penerbitan Asa Sdn Bhd & Ors [1998] 5 MLJ 297 ***(refd)***
Smith [1858] 8 Cox 32 ***(refd)***
Smith v. Hughes [1871] LR 6 QB 597 ***(refd)***
Storer v. Manchester City Council [1974] 3 All ER 824 ***(refd)***
Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***
T Chellapah v. Official Assignee [1971] 1 MLJ 24 ***(refd)***
Teck Leong Trading Company v. Mohd Tamrin Abdul Ghafar [1994] 4 CLJ 772 HC ***(refd)***
Vorster 103 LQR 27d ***(refd)***
Wong Kim Fatt v. Yong Kwet Yin [1996] 1 BLJ 444 HC ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors [1981] 1 MLJ 14 ***(refd)***

Legislation referred to:
Moneylenders Act 1951, ss. 2A(1)(h), 3
Rules of the High Court 1980, O. 92 r. 1

For the plaintiff - Tan Keng Teck (Rohana Ngah with him); M/s Lim Kian Leong & Co
For the defendants - Ravindra Nanukuttan; M/s Ravindra & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

[1] This was an appeal by the defendants in encl. 14 against the decision of the learned senior assistant registrar allowing the plaintiff's application to enter a summary judgment against the

defendants for the sum of HK$451,421.85 or alternatively the sum of RM259,110.97 which constituted the balance from the sum of HK$1,000,000 together with interest and costs.

Facts Of The Case

[2] The plaintiff was a company having its office in Hong Kong and was involved in floral business there.

[3] On or about September 1995, the plaintiff had agreed to grant a friendly loan to the first defendant for the sum of HK$1,000,000 on the second defendant's request to assist the first defendant in its business. By a letter dated 2 September 1995, the second defendant had given his account number in Chung Khiaw Bank (M) Berhad to the plaintiff in order to facilitate the sum of RM320,000 to be remitted to him. On 12 September 1995, the plaintiff instructed its bank to remit the loan for the sum of RM320,000 into the second defendant's account. As a consideration for the plaintiff granting the loan to the first defendant, the second defendant had signed a letter of guarantee dated 11 September 1995 whereby the second defendant agreed to guarantee the said loan together with the interest given to the first defendant and the second defendant too shall be made liable in the event the first defendant failed to repay the loan together with interest thereon to the plaintiff. By a letter dated 4 March 1997, the second defendant's wife informed the plaintiff in regard to the cancellation of the cheques and had furnished ten cheques for the payment of the said loan. By a debit note dated 22 April 1998, the plaintiff had demanded from the first defendant for the balance of HK$451,412.85 or alternatively the sum of RM259,110.97. On 3 June 1998, the plaintiff through its solicitors had demanded from the first and the second defendants the outstanding sum of HK$451,412.85 or alternatively the sum of RM259,110.97 as at 30 April 1998.

Analysis

[4] The defendants argued that the payments made by the first defendant to the plaintiff were meant for the imports of the flowers and that the transactions between both the parties were related to the floral business. With respect, these arguments constituted bare allegations unsupported by any relevant documentary evidence.

[5] Exhibits "GHC1" and "GHC2" of the defendants' additional affidavit clearly showed that the transactions between the plaintiff and the person by the name of "La Chew" as the buyer together with the invoices issued by the plaintiff clearly stated that the person by the name of "La Chew" would make the necessary payment to the plaintiff and not to the first defendant as alleged in the defendants' additional affidavit. Furthermore the defendants' averments in their affidavits were inconsistent with the second defendant's statements and the available documentary evidence.

[6] The first inconsistent statement would be as follows:

(a) In encl. 6 at para. 9, the second defendant averred as follows:

> Pada kesemua masa material defendan pertama telah mengimport barangan bunga-bungaan antara lain daripada plaintif dan defendan telah membuat bayaran kepada plaintif secara menjual dan membeli.

(b) In encl. 13 at para. 8, the second defendant averred as follows:

> .... dan justeru itu cek-cek yang dirujuk dalam 'eksibit tersebut' adalah berkenaan bayaran-bayaran yang telah dibayar untuk barangan yang dihantarserah kepada defendan pertama dan bukan tujuan membayar plaintif seperti yang dimaksudkan dalam perenggan 10 dalam 'afidavit tersebut'.

(c) In sharp contrast would be para. 7 of the defendants' additional affidavit and there the second defendant averred as follows:

> Semua invois berkenaan iaitu no: 92489 dan 92490 bertarikh pada 16hb September 1997 dibuka atas nama agen tersebut tetapi adalah persetujuan plaintif dan defendan bahawa defendan pertama perlu membayar komisyen atas barangan yang dibekalkan tersebut terus kepada deponent afidavit-afidavit plaintif iaitu Chan Li Ping Wah dan untuk barangan kepada plaintif ...

[7] From these recitals, it would be apparent that the second defendant had never raised the allegation that the payments made by the first defendant were for the commission until the filing of the defendants' additional affidavit.

The second inconsistent statement may be stated as follows:

(i) The second defendant in para. 5 of the defendants' additional affidavit averred that:

> Saya memohon Mahkamah Yang Mulia ini untuk merujuk kepada afidavit jawapan kedua Gan Hian Cho yang diikrarkan pada 1hb Disember 1999 dan di perenggan-perenggan 8 dan 9 di mana dikatakan bahawa cek-cek yang dikeluarkan adalah pembayaran biasa dan dalam urusniaga antara plaintif dan defendan ...

And continuing at para. 7 of the defendants' additional affidavit, the second defendant averred as follows:

> Semua invois berkenaan iaitu no: 92489 dan 92490 bertarikh pada 16hb September 1997 dibuka atas nama agen tersebut tetapi adalah persetujuan plaintif dan defendan bahawa defendan pertama perlu membayar komisen atas barangan yang dibekalkan tersebut terus kepada deponent afidavit-afidavit plaintif, iaitu, Chan Li Ping Wah dan untuk barangan kepada plaintif. Cek-cek yang dirujuk dalam perenggan-perenggan 8 dan 9 afidavit Gan Hian Cho bertarikh pada 1hb December 1999 adalah untuk pembayaran tersebut di atas dan bukan pembayaran yang dimaksudkan oleh plaintif.

(ii) The second defendant in his affidavit affirmed on 1 December 1999 in para. 8 averred as follows:

> Merujuk kepada perenggan 10 dan eksibit 'D' dalam afidavit tersebut dan juga terjemahan eksibit 'D1' dalam 'Afidavit Peguamcara Plaintif' saya ingin menyatakan bahawa pihak plaintif dan defendan pertama ... justeru itu cek-cek yang dirujuk dalam 'eksibit tersebut' adalah berkenaan bayaran-bayaran yang dihantarserah kepada defendan pertama ... .

And in para. 9 of the same affidavit, the second defendant averred as follows:

> Saya juga ingin menyatakan bahawa eksibit 'D' tidak merujuk kepada maksud dan/atau sebab-sebabnya cek-cek tersebut dikeluarkan. Ini menunjukkan bahawa bayaran tersebut adalah pembayaran biasa dan dalam urusniaga antara plaintif dan defendan pertama.

Now, when read literally, the second defendant's statements would amount to this. That the cheques referred to in exh. "D" and exh. "D1" were the cheques that were meant for the payment of the transactions between the plaintiff and the first defendant as alleged in exh. "GHC1" and "GHC2" of the defendants' additional affidavit. And that both these two exhibits – referring to exhs. "GHC1" and "GHC2" annexed to the defendants' additional affidavit, showed that the transactions between the plaintiff and the person by the name of "La Chew" took place on 16 September 1997. In fact, the first defendant's letter (as reflected in exh. "D" of encl. 4 and exh. "D1" of encl. 12) was written by the second defendant's wife on 4 March 1997 and all the affidavits filed by the defendants had never denied its authenticity. In my judgment, it would be reasonable to infer that the payments in exhs. "D" and "D1" had nothing to do with the transactions as stated in exhs. "GHC1" and "GHC2" of the defendants' additional affidavit.

[8] It would now be appropriate to state the law in regard to an O. 14 application. For this exercise, I need to refer to only one authority and that would be the case of *Kapital Raya Sdn Bhd lwn. Bloomville Corp Sdn Bhd* [1996] 3 MLJ 522. There the headnote carries the following summary (see p. 525 to p. 526 of the report):

(1) In an O. 14 application, the court has to be satisfied on the affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether or not an issue is triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court (see p 530C-D); *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400 followed.

(2) In an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge would not be able to exercise his discretion judicially in an O. 14 application (see p 530E-G); *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400 followed.

[9] I have dutifully examined the facts in the context of the relevant documentary evidence in order to ascertain whether the issues raised by the defendants were triable. I arrived at the conclusion that those issues were not triable.

[10] The defendants saw it fit to raise issues in their affidavits notwithstanding that they were not raised in their statement of defence. The defendants should be estopped from doing so.

[11] In regard to the issue of pleadings, I would refer to the case of *Development and Commercial Bank Berhad v. Abdullah bin Ismail & Anor*. [1989] 1 CLJ 190; [1989] 1 CLJ (Rep) 467, where Siti Norma Yaakob J (now Chief Judge of Malaya) aptly said of the report:

> It is a cardinal principal of pleadings that the parties to an action are bound by their own pleadings. By raising the issue of estoppel in their affidavit for the first time, the defendants are clearly seeking to improve on their Statement of Defence and following the decision of *UMBC v. Palm and Vegetable Oil* [1983] 1 MLJ 206/[1982] 1 CLJ 547, this is not permissible, particularly so in this case when this plea alone was relied upon as the defendants chose to abandon the other issues raised in their Statement of Defence.

[12] It was argued by the plaintiff that exh. "A" annexed to the affidavit in support in encl. 4 contained Chinese handwritings and these handwritings were not translated into Bahasa Malaysia as required by O. 92 r. 1 of the Rules of the High Court 1980 ("RHC"). It was, however, not totally in the Chinese writing like the telephone directory in the case of *Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729. In that case the appellant alleged that the respondent had compiled, published, printed, distributed and sold telephone directories in the Chinese language entitled "Malaysian Business Chinese Directory" (hereinafter referred to as the 'book'), and that the respondent in doing so, had obtained or copied substantially from the telephone directories published by the appellant without first obtaining their permission or authority. The appellant sought and obtained an injunction pending trial in order to restrain the respondent from printing the book and for damages to be assessed. The High Court dismissed the appellant's claim with costs. The appellant has appealed. The Supreme Court dismissed the appeal and held that the book was in the Chinese writing and that it was the primary

function and duty of the trial judge to look at the book in order to satisfy himself what it was and decide, if necessary, with the help of experts in the Chinese language and writing as to whether the book was in fact a telephone directory as defined by the law. The Supreme Court further held that it was impossible for the judge just by looking at the book to come to any decision simply because he himself was unable to understand it. The Supreme Court also held that O. 92 r. 1 of the RHC is a mandatory provision which requires that any document not in the national language or in the English language be translated into the national language before it could be admitted as an exhibit. Consequently, the Supreme Court held that the book could not be admitted as an exhibit and without it, the appellant's claim failed.

[13] Here, exh. "A" of encl. 4 was clear even without the national language translation because it stated the account number and the name of the account holder into which the plaintiff had remitted the friendly loan in favour of and for the benefit of the first defendant. All the documents showed that the loan was remitted into the second defendant's account for the benefit of the first defendant who would be able to improve and enhance its business (see para. 6 of encl. 7). Incidentally, all these allegations about the Chinese handwritings that were not translated into Bahasa Malaysia had not been raised in the defendants' affidavits.

[14] In my judgment, the money lent to the first defendant belonged to the plaintiff. There was no necessity for a formal agreement to be entered between the parties in order to bind the first defendant and the plaintiff to the friendly loan transaction. Speaking generally, a contract can be made orally without any legal formality. Numerous contracts are made as part of everyday life and the parties who made them rarely give thought to legal technicalities. Making a contract is simply a way of facilitating, amongst other things, the exchange of goods and services. A contract is said to be an agreement with undertakings – promises or obligations, on both sides. It is an agreement that is intended to have legal consequences. There must be a meeting of the minds between the contracting parties. It is what is described by textbook writers as a consensus *ad idem*. But it must be borne in mind that the law takes an objective approach to assess an agreement. The law is not concerned with what is in the minds of the parties. The law is concerned with what can be inferred from their conduct. Lord Denning in *Storer v. Manchester City Council* [1974] 3 All ER 824 at p. 828 remarked that:

> In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract.

This is an objective approach. It is usually not possible to ascertain a person's subjective approach when bargaining for a contract. In the interests of fairness, certainty and commercial convenience, the parties are deemed to have reached an agreement if, viewed objectively, they appear to have agreed. An objective approach would mean that an assessment would be made in relation to a reasonable person in the position of the offeree just like the case of *First Energy (UK) Ltd v. Hungarian International Bank Ltd* [1993] BCLC 1409 (per Steyn LJ at p. 1417).

[15] A person is bound whatever his real intention may be if "a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him" (*Smith v. Hughes* [1871] LR 6 QB 597 at 607; *Cambridge Nutrition Ltd v. B.B.C.* [1990] 3 All ER 523 at 542; *Howarth* 100 LQR 265; *Vorster* 103 LQR 27d; Goddard 7 Legal Studies 263; and de Moor 106 LQR 632).

[16] It is the law that an enforceable agreement can be made orally or in writing. The test of enforceability is the requirement of consideration. Lush J in *Currie v. Misa* [1875] LR 10 Ex 153, aptly said, in an attempt to define consideration, at p. 162:

> A valuable consideration, in the eyes of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.

Here, as the facts unfolded, there was consideration for the plaintiff granting the loan to the first defendant when the second defendant signed a letter of guarantee dated 11 September 1995. By that letter of guarantee, the second defendant agreed to guarantee the said loan together with the interest given to the first defendant. And under that letter of guarantee, the second defendant shall be made liable in the event the first defendant failed to repay the loan together with the interest thereon to the plaintiff. Thus, there was a contract in existence between the parties.

[17] Next, it was argued that the loan granted by the plaintiff to the first defendant was illegal pursuant to the Moneylenders Act 1951 (Revised 1989) (Act 400). At all material times the plaintiff was running a floral business and this was not denied by the defendants in their affidavits. The plaintiff was not required to have a licence in order to give a loan with interest to the first defendant because the plaintiff was not operating a moneylending business and that the loan given to the first defendant was in the words of the plaintiff a "one off transaction". Section 2A(1)(h) of the Moneylenders Act 1951 (Revised 1989) (Act 400) enacts as follows:

2A. Non-application of Act and exemption therefrom.

(1) This Act shall not apply to:

(h) any person *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

[18] Salleh Abbas FJ speaking for the Federal Court in *Yeep Mooi v. Chu Chin Chua & Ors.* [1981] 1 MLJ 14, had this to say (see p. 15 to p. 16 of the report):

> We have on another occasion observed that the Moneylenders Ordinance, 1951 does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business. (*Ngui Mui Khin & Anor. v. Gillespie Bros. & Company Ltd.* [1980] 2 MLJ 9). We agree with the courts below that the fact that the appellant by depositing a sum of RM5,000 at 14.4% per annum with the deceased raises a presumption under section 3 of the Ordinance that she was a moneylender. This section enacts:
>
> 3. Save as excepted in paragraphs (a), (b), (c), (d) and (e) of the definition of 'moneylender' in section 2 of this Ordinance, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.
>
> However, the presumption is not irrebuttable. It can be rebutted, *inter alia*, by the fact that the appellant did not deposit her money with the pawnshop as a business of moneylending – ie, she did not carry on the business of moneylending. Section 2 of the Ordinance defines a moneylender, subject to a number of exceptions, to include:

> every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business ...

Thus the crux of the matter is the lending of money by a person, whose business is moneylending. This is purely a question of fact (*Kirkwood v. Gadd* [1910] AC 422). In the circumstances of this case we are of the view that the appellant was not carrying on the business of moneylending by depositing the sum in question, albeit at an interest and despite the fact and *(sic)* (that) she had on two previous occasions placed two other deposits, one deposit amounting to $1,000 with the deceased in 1969 and another amounting to $5,000 with another pawnshop for two months in March 1971. Her main occupation was one of seamstress. According to her evidence, the money she deposited was a hard earned money which she saved from the occupation as a seamstress. She kept her money there as a saving and she knew that pawnshop paid interest on deposit. There seems to be no reason to reject or to disbelieve this evidence. The deposit therefore was nothing more than being incidental to her main occupation. She kept no record and issued no note or document apart form *(sic)* (from) holding on to the receipt Exhibit P2 issued to her by the deceased. Her case is just like every other person who has some extra money to spare and keeps that money in a bank or in any other financial institution as a saving against rainy days whilst at the same time hoping to earn some interest in the meantime. Although such a person is in law a lender, he is certainly not a moneylender, even though he may repeatedly and frequently deposit money as and whenever he has some to spare. Repetition of similar deposits *per se* does not necessarily constitute a business, still less the business of moneylending. In our view the placing of the sum in question on deposit by the appellant despite the previous two other deposits does not amount to a carrying on a business at all. Even assuming that it does so amount, the business so carried on is certainly not the business of moneylending. Far from it, such business is not the appellant's main occupation. As earlier stated, it cannot be otherwise than purely incidental to her main occupation as a seamstress. That brings her within one of the exceptions in paragraph (c) of the definition of moneylender under section 2 of the Ordinance, ie, "a person ... *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money is not a moneylender'. We are therefore unable to agree with the decisions of the courts below that the appellant was a moneylender.

[19] In *Teck Leong Trading Company (Suing As A Firm) v. Mohd Tamrin bin Abdul Ghafar* [1994] 4 CLJ 772, Dato' Dr. Zakaria bin M. Yatim J, had this to say about a friendly loan (see p. 774 to p. 775 of the report):

> With regard to the defendant's allegation that the friendly loan was a money lending transaction, the question for the Court to decide was a question of fact. It was for the Court to see whether the primary principal object of the plaintiff's business was one of money lending. See *Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd.* [1980] 2 MLJ 9 @ 12. In that case certain transactions took place between the respondents, a London confirming house and a Singapore company relating to the financing of purchases of goods by the Singapore company. The appellants gave a guarantee to the respondents with respect to those transactions. Teh respondents obtained judgment in the Singapore High Court against the Singapore company, and as the judgment remained unsatisfied they sued the appellants on the guarantee. The appellants alleged that the transactions between the respondents and the Singapore company were in essence money lending transactions. The respondents applied for final judgment against the appellants and their application was granted. The appellants appealed to the High Court and their appeal was dismissed. The appellants appealed to the Federal Court. The Federal Court decided on the facts of that case that the transactions were not money lending transactions.
>
> In the present case, I was satisfied that the principal object of the plaintiff's business was not one of money lending. See paragraphs 5-9 of the plaintiff's affidavit (enclosure 26) quoted above. The defendant did not produce any evidence that this was a money lending transaction.

[20] All these authorities served as useful guidelines to adjudicate the defendants' appeal in encl. 14. Whether the plaintiff conducted a moneylending business was entirely a question of fact. The facts here showed otherwise. The defendants merely alleged that the plaintiff was a moneylender unsupported by any concrete evidence. The plaintiff has rebutted the presumption as set out in s. 3 of the Moneylenders Act 1951 (Revised 1989) (Act 400) by way of an affidavit evidence. In *Wong Kim Fatt v. Yong Kwet Yin* [1996] 1 MLJ 45, the headnote carries this passage, germane to the occasion at hand (see p. 46 of the report):

(1) From the affidavit evidence, it was clear that the appellant did not advertised or held himself out in any way as a moneylender as defined by s. 2 of the Act. The allegation of moneylending was merely a bare allegation which was unsupported by any concrete evidence. A denial of moneylending by way of affidavit evidence would be sufficient to rebut the presumption of being a moneylender under s. 3 of the Act. It is not necessary for the appellant to obtain the services of a competent officer from the licensing authority to swear an affidavit to say that the appellant was not a moneylender (see pp 53D-F and 54H); *Teng Ah Seah v. Teh Choo Pheng* 2 MC 253, *Litchfield v. Dreyfus* [1906] 1 KB 584 and *Larut Matang Supermarket Sdn Bhd v. Liew Fook Yung* [1995] 1 MLJ 375 followed.

[21] The defendants relied on the case of *T. Chellapah v. Official Assignee* [1971] 1 MLJ 24, FC to argue that the plaintiff had granted the loan together with an interest and this meant that the plaintiff was an unlicensed moneylender and that the onus was on the plaintiff to rebut the presumption raised in s. 3 of the Moneylenders Act 1951 (Revised 1989) (Act 400). In that case, the official assignee succeeded in proving that the appellant there was, in fact, a moneylender. In short, the official assignee had proved a system and continuity that the appellant there was a moneylender. Likewise, in the present appeal before me, the plaintiff had proved by way of an affidavit evidence that it was not a moneylender as defined in the Moneylenders Act 1951 (Revised 1989) (Act 400).

[22] The case of *Malayan Banking Bhd v. Teguh Consolidated Sdn Bhd & Anor & Another Case* [1998] 1 CLJ 254 which was relied upon by the defendants can be distinguished on the facts. That case concerned an application to strike out the counterclaim. Here, it was in relation to an application for summary judgment.

[23] Next, the second defendant denied that he had signed the letter of guarantee and the debit note dated 5 August 1997 and the second defendant even alleged that the plaintiff had amended both these documents for its own benefit. Having perused these two documents, it was inescapable that the second defendant had signed them. If as alleged by the second defendant, which was denied by the plaintiff, that both these two documents were forged or amended by the plaintiff then the second defendant should have lodged a police report. But, alas, no police report was lodged against the plaintiff. It must be borne in mind that the offence of forgery is a serious criminal wrong. To constitute

the offence of forgery, it is sufficient to prove that the wrongdoer makes the "false document." And whoever makes a "false document" commits forgery. To constitute the offence of forgery, it is not necessary that the document should be published or made in the name of a really existing person. Making a false document is different from causing a false document to be made (*Panchanan Maity* [1953] 57 CWN 891). It is not necessary that the document that has been forged should be published or made, for that matter, in the name of a really existing person. Bramwell B, in *Smith* [1858] 8 Cox 32, 37 aptly said that:

> Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other.

As demonstrated, it is a criminal wrong to forge a document. If indeed the plaintiff had forged those documents, the second defendant, as I said, should have lodged a police report forthwith and bring the plaintiff to the altar of justice, so to speak. Bereft of a police report, the allegation by the second defendant must be construed as a bare allegation. The same approach was adopted by Mahadev Shankar J (as he then was) in the case of *Paldraman a/l Palaniappan & 2 Ors. v. Lachemi a/p Sanganayar* [1992] 4 CLJ 1870; [1992] 3 CLJ (Rep) 188. There, at p. 1871, his Lordship had this to say:

> In all the circumstances of this case and in the light of this letter I consider the Defendant's bare allegation that she was defrauded into executing the Statutory Declaration and the Application for Transfer inherently incredible and totally unworthy of belief. There was no Police report and there was absolutely no action taken to establish the alleged forging even though the Defendant was then being legally advised.

[24] Finally, it was argued that the loan advanced by the plaintiff contravened the Exchange Control Act 1953 (Act 17) and the Banking And Financial Institutions Act 1989 (Act 372). Unfortunately, these constituted new issues which have not been raised by the defendants in their affidavits and they must be construed as mere after thoughts. The defendants must be estopped and precluded from raising these two new issues at this point of time. It would be germane to refer to the case of *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738, CA. There,

Gopal Sri Ram JCA writing a separate judgment spoke about the need to condescend to particulars. At p. 753 of the report, this was what his Lordship said:

> Secondly, neither in the defence nor in the affidavit in opposition are there any particulars of the alleged fraud or conspiracy. It is of no consequence that the defence does not condescend to particulars. After all, this was an application under the summary jurisdiction so that there was no obligation on the part of the appellants to even deliver a defence. But the affidavit must do so. The strictness with which this rule as to pleading has to be observed, even in cases coming within the summary procedure, is demonstrated by the decisions in *Cannock Chase District Council v. Kelly* [1978] 1 All ER 152; [1978] 1 WLR 1, and *See Hua Daily News Bhd v. Tan Thien Chin* [1986] 2 MLJ 107. In the latter case, Mohamed Azmi SCJ when dealing with a charge of fraud raised by a defendant in an application under O. 14 said at p 111:
>
> > Having regard to the factual situation in this case, we see no reason to disturb the finding of the learned judge that the allegation of fraud is not only frivolous but also not *bona fide*. The reasons given by the learned judge for coming to this conclusion are well founded. **Firstly, the failure of the appellants to condescend upon particulars of the fraud in their affidavits is fatal.** (emphasis added.)
>
> I think that his Lordship's words are apposite to the present case. Here too, it would appear that the charge of conspiracy to defraud is not made *bona fide*, and that there are certainly no particulars in support of it.

[26] In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239, SC, the Supreme Court held that where a vital issue was not raised in the pleadings, it could not be allowed to be argued and to succeed on appeal. And the same approach was also adopted by the court in *Perwira Habib Bank (M) Bhd v. Penerbitan Asa Sdn Bhd & Ors* [1998] 5 MLJ 297.

Conclusion

[27] For the reasons as adumbrated above, the defendants have failed to raise a triable issue and all the allegations raised by the defendants were mere afterthoughts concocted to delay the payment of the friendly loan given by the plaintiff to the first defendant. I dismissed the defendants' appeal in encl. 14 with

costs. I too dismissed encl. 31 with costs because encl. 31 was tied up with encl. 14. Enclosure 31 concerned the defendants' appeal against the decision of the learned senior assistant registrar in dismissing the defendants' application for a stay pending appeal to the judge in chambers in regard to encl. 14. Finally, I ordered the file to be closed.